OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

LEGAL BUREAU BULLETIN

Vol. 47, No. 2 February 2017

I. **SUBJECT:** DISORDERLY CONDUCT

II. **QUESTION:**

(1) WHAT ARE THE CORE REQUIREMENTS FOR DISORDERLY CONDUCT UNDER NEW YORK STATE PENAL LAW § 240.20?

(2) UNDER WHAT CIRCUMSTANCES MAY A POLICE OFFICER CHARGE AN INDIVIDUAL WITH DISORDERLY CONDUCT UNDER SUBSECTIONS 5 OR 6?

III. DISCUSSION

A. Introduction

The purpose of this Bulletin is to summarize the two elements that apply to all seven subsections of New York's disorderly conduct statute, Penal Law § 240.20. This Bulletin also specifically explains the circumstances under which an officer can charge a person with either Subsection 5, "obstruction of vehicular or pedestrian traffic," and/or Subsection 6, "refusal to obey a lawful order to disperse," of the disorderly conduct statute.

B. Core Elements of Disorderly Conduct

New York State Penal Law § 240.20 has seven subsections. For an arrestee to be charged under any of these subsections, the conduct must: (1) have caused actual or threatened public harm (the "public harm requirement"); and (2) been done with the intent to cause public inconvenience, annoyance, or alarm (the "intent requirement"). These requirements are discussed in more detail below.

1. The Public Harm Requirement

Officers must consider these factors in assessing whether the public harm element is met:

a. The nature and character of the conduct;

b. The time and place where the conduct occurred (i.e. a courthouse during business hours, which is more likely to cause "public harm," as opposed to a desolate sidewalk in the middle of the night, which is less likely to cause "public harm");

c. The number of people in the vicinity;

d. Whether other people in the vicinity were drawn to the disturbance;

e. The number of people in the vicinity who were drawn to the disturbance; and

f. That people in the vicinity reacted to the offender's conduct by, for example, being forced to walk in the street to avoid a large crowd, calling for help, being forced to back away for safety, running away from the vicinity, expressing fear, or appearing fearful.

Applying these factors, courts have held that the arrestee's conduct did not satisfy the public harm element in the following two cases:

- After an officer ran the license plate of a car parked in a driveway, a male went up to the officer's vehicle, leaned into the vehicle's window in a non-threatening manner, and asked why the officer had checked the plate. The male then cursed at the officer and accused the officer of harassing him. The officer then placed the male under arrest. The court noted that, while about ten people had gathered on the sidewalk behind the male, there was no indication whatsoever that any of the bystanders were going to involve themselves or actually involved themselves in the dispute between the male and the officer. The court also emphasized that the male was speaking only to the police officer, and that the officer could have just closed the car window and ignored the male. Further, it was obvious that the male was not trying to rile up the bystanders, but was just trying to pester the police officer, which, by itself, is not disorderly conduct.[1]

- An individual shouted obscenities at police officers in a subway station, which provoked "looks of surprise and curiosity" and "evasive movements" from some bystanders. The court explained that a person may be arrested for disorderly conduct "only when the situation extends beyond the exchange between the individual disputants to a point where it becomes a potential or immediate public concern." In this case, like the previous example, the offender's conduct was clearly intended to aggravate just the police officers at whom he shouted, as opposed to the bystanders.[2]

On the other hand, courts have held that an arrestee's conduct did meet the "public harm" element in the following cases:

- An individual "unleashed an expletive-laden tirade" against court officers in the lobby of a criminal courthouse. The court pointed out that this occurred (1) during business hours; (2) in front of between six and 11 people; and (3) at least three of those people were drawn to the disturbance. The court also emphasized that a courthouse is "a setting in which even a minor disturbance may rise to the level of a 'public problem.'" The court also stated that, given the need to keep a calm atmosphere in a courthouse, officers are allowed to exercise more control than might be allowed in another setting.[3]

- An individual at the Yonkers City Hall loudly shouted obscenities at several City Hall employees. The court pointed out that the arrestee's conduct (1) took place in the presence of employees; (2) that members of the public were seated only a few feet away in a waiting room; (3) that four or five individuals were attracted by the sounds of the altercation and gathered nearby; and (4) that the arrestee's conduct continued even after security personnel repeatedly asked him to stop.[4]

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[1] People v. Baker, 20 N.Y.3d 354 (2013)
[2] People v. Gonzalez, 25 N.Y.3d 1100 (2015)
[3] Hughes v. Lebron, 14 CV 9479 (PAE), 2016 U.S. Dist. LEXIS 127569 (S.D.N.Y. Sept. 19, 2016).
[4] People v. O'Neill, No. 13-2478, 2015 NY Slip Op. 51440(U) (N.Y. App. Term Sept. 18, 2015).

2. The Intent Requirement

The offender's conduct must be done with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof.

To illustrate, a court found that the "intent" element was not met in the following situation:

- The criminal complaint alleged that at approximately 2:01 a.m., the defendant "with intent to cause public inconvenience, annoyance and alarm and recklessly creating a risk thereof, obstructed vehicular and pedestrian traffic." The complaint further stated that the officer observed the defendant standing on a public sidewalk with a number of other individuals and not moving, and that as a result, numerous pedestrians had to walk around the group. The court explained that these allegations did not meet the "intent" element because "[n]othing in the information indicate[d] how defendant, when he stood in the middle of a sidewalk at 2:01 a.m., had the intent to or recklessly created a risk of causing 'public inconvenience, annoyance or alarm.'" [5]

Conversely, a court found that the intent element was met in the following scenario:

- The criminal defendant and approximately 30 others walked in a roadway and caused about 20 vehicles in the south bound lane of the street to come to a complete stop and caused vehicles in the north bound lane to swerve and stop. The court also noted that an officer repeatedly asked the group of individuals to leave the roadway and walk onto the sidewalk. Putting people on notice that their conduct was creating a public inconvenience helps to clearly establish the intent element.[6]

Note that an officer does not need personal knowledge of the offender's mindset to determine intent. Instead, in many circumstances, officers may infer an offender's intent from his actions, as well as accompanying words, where applicable.

C. Subsections (5) and (6) of the Disorderly Conduct Statute

In addition to the first two elements described above, an offender's conduct must fall into one of the seven subsections of the disorderly conduct statute in order to meet the elements of the offense. Subsections (5) and (6) of the disorderly conduct statute are specifically discussed below.

1. Subsection (5) – Obstruction of Vehicular or Pedestrian Traffic

Penal Law § 240.20(5) states that, "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

. . . He obstructs vehicular or pedestrian traffic."

In order for officers to charge a person under Subsection (5), he or she must cause more than a mere inconvenience to the public.[7] In other words, the obstruction must be substantial, and not simply a "routine" annoyance that people would expect to "endure in th[e] city on a regular

[5] People v. Jones, 9 N.Y.3d 259 (2007).
[6] People v. Donnaruma, 38 Misc. 3d 506, 513 (N.Y. Cty Crim. Ct. 2012).
[7] People v. Jones, 9 NY 3d 259 (2007).

basis."[8] Otherwise, any person who simply happens to stop on the sidewalk to greet a friend, ask for directions, or just figure out where he or she is going would be subject to arrest for disorderly conduct. This is clearly not the intent of the disorderly conduct statute.

An example of what the courts have commonly held to be a "mere inconvenience" is passersby having to simply walk around or sidestep the offender.

When a person is violating Subsection (5) by standing in a roadway or other thoroughfare, officers will have to enter the roadway, which may result in traffic being blocked further. Officers must be able to articulate that the offenders themselves created the initial obstruction, and not solely the officers who responded. Applying this principle, in the following example, a court would find that there was no probable cause for officers to arrest individuals under Subsection (5):

- Dozens of people are marching down a street, causing that street to be entirely impassable. In order to prevent additional people from entering the street and joining the dozens of marchers, officers form a line extending curb-to-curb at both ends of the street, thereby blocking vehicular traffic themselves. Simultaneously, officers also give verbal orders to the corralled-in marchers to leave the street. Most of the marchers try to comply with the officers' commands. However, because the officers have blocked both ends of the street to prevent more people from blocking the street, the marchers are unable to comply with the officers' orders to exit.

Courts consider the below factors in deciding whether there is a substantial inconvenience:

a. The extent to which the conduct annoyed others;

b. Whether the offender continued with the conduct even after officers told him to stop;

c. Whether the offender's conduct created, at a minimum, a substantial risk that disorder might result; and

d. The location where the conduct occurred.

To illustrate, a court has found that there was no probable cause to arrest an individual under Subsection (5) under the following circumstances:

- Officers observed the criminal defendant and five or six individuals congregating in front of a building in front of a housing complex. The officers told the individuals to leave on three occasions. They complied each time, but kept returning to the area. The court held that there was no probable cause because there was no evidence whatsoever that (1) anyone tried to pass the group; (2) that anyone was unable to pass the group; or (3) that anyone, other than the individuals congregating, was even around.[9]

On the other hand, a court held in the following scenario that the criminal complaint sufficiently alleged that the arrestee had violated § 240.20(5):

- Officers observed the criminal defendant and approximately three to five others standing directly in front of the door to a market in a three-foot-wide shoveled pathway that was surrounded by snow and ice. During the five to ten minutes the officers observed the group, two or three customers entered the market. These customers were

[8] See People v. Gragert, 1 Misc. 3d 646, 650-651 (N.Y. Crim. Ct. 2003) (holding that there was no probable cause to arrest an individual for laying on a sidewalk in a busy midtown street as part of a protest).
[9] People v. Edmund, 17 Misc. 3d 1130(A) (N.Y. Sup. Ct. 2007)

forced to walk around the group, and onto ice and snow in order to enter. The officers then asked the individuals to move up the block. The defendant refused. The court explained that (1) the combination of the icy conditions; (2) the fact that the group was standing in the only shoveled path leading up to the door of the market; and (3) the fact that the group made it more difficult for customers to get into the market by forcing them to walk on ice and snow contributed to the officers' probable cause to arrest.[10]

D. Subsection (6) – Refusal to Comply With a Lawful Order to Disperse

Penal Law § 240.20(6) states that, "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof …

(6) He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse."

The courts define a "group" under Subsection (6) as at least three individuals.[11]

Additionally, the courts have made clear that merely congregating with a small group of people, "even people of bad reputation," does not give rise to an actual or threatened public harm that would support a charge under this subsection.[12]

Most importantly, an officer's order to disperse must be lawful. An order to disperse is lawful for the purposes of Subsection (6) of the disorderly conduct statute unless such order was "'purely arbitrary' and 'not calculated in any way to promote the public order.'" An order to disperse is most commonly lawful where it is given to enforce another statute or code.[13] To give an example, a court has found an order to disperse to be lawful where an order was given to a large group to disperse from a park in order to enforce park rules and to allow the management company to clean the park.[14]

Further, in the context of dispersal orders, courts have looked to three factors when determining if there was probable cause to arrest for failure to disperse: (1) whether the police communicated the orders to the crowd; (2) how the police communicated those orders; and (3) whether individuals in the crowd actually had an opportunity to comply with those orders.[15]

IV. CONCLUSION

There is no particular combination of factors that will always create probable cause for a disorderly conduct arrest. Each situation must be analyzed on a case-by-case basis, and will turn on the particular facts presented.

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[10] U.S. v. Nelson, 10 CR 414 (PKC), 2011 U.S. Dist. LEXIS 36483 (S.D.N.Y 2011).
[11] People v. Carcel, 3 N.Y.2d 327 (1957).
[12] People v. Johnson, 22 N.Y.3d 1162 (2014) (holding that there was no probable cause to arrest alleged gang members for disorderly conduct where they were standing on a street corner partially blocking the entrance to a store).
[13] Officers' authority to gives dispersal orders arises from the New York City Charter's delegation of the duty of police to preserve the public order by, for instance, facilitating traffic.
[14] Caravalho v. City of N.Y., 13 CV 4174 (PKC) (MHD), 2016 U.S. Dist. LEXIS 44280 (S.D.N.Y. Mar. 31, 2016).
[15] Mesa v. City of N.Y., 09 CV 10464 (JPO), 2013 U.S. Dist. LEXIS 1097 (S.D.N.Y. 2013).

If feasible, before making an arrest for disorderly conduct, officers should give warnings to individuals about the conditions their behavior is causing and also give them a reasonable opportunity to cease the disruptive behavior.

If a summons is issued, officers must ensure that the narrative portion of the summons contains, at a minimum, the following information:

a. A description of the arrestee's behavior (for example, state that "the defendant sat in a roadway with approximately 20 other individuals and prevented 5 cars from passing," rather than simply writing that "the defendant blocked traffic");

b. The conditions his or her behavior is causing;

c. The number of people inconvenienced and/or threatened by the behavior;

d. A description of the area;

e. The officer's warnings, if applicable; and

f. Bystanders' or passersby's reactions to the offender's conduct, if applicable.

Additionally, all of this information should also be documented in an Activity Log entry and any other relevant Department and criminal court documents.

Officers should use the factors discussed in this Bulletin as general, but not all-inclusive, guidelines to determine whether they have probable cause to make an arrest for disorderly conduct under either or both Subsection (5) or Subsection (6) of the disorderly conduct statute. Officers are urged to contact the Legal Bureau at (646) 610-5400 with any questions concerning the above-mentioned principles.

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